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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1710~~ 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Federal Communications Commission, United States of America, Channel 3, Inc., Civic Communications Corp., Communications Improvement, Inc., Dixie National Broadcasting Corp., Jackson Television, Inc.,

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OPINIONS BELOW

The opinion of the Federal Communications Commission is officially reported at 26 F.C.C.2d 100 (1970), and is reproduced in the appendix to this petition. (A.1) The Order of the United States Court of Appeals for the District of Columbia Circuit is not officially reported, but is reprinted in the appendix to this petition. (A.23)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 17, 1971. (A.23) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), are violated by a decision and order of the Federal Communications Commission which deprives a validly licensed television station operator of authority to operate that station and enjoy the fruits therefrom, where its pending application for renewal of license was timely and properly filed and has received no final disposition by the agency, and where the only properly made factual determination as to whether said application should be granted was resolved in favor of the applicant?

STATUTORY PROVISIONS

Section 307(d) of the Communications Act of 1934, as amended (47 U.S.C. § 307(d)), provides in pertinent part:

> "... Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, ... if the Commission finds that public interest, convenience, and necessity would be served thereby. ... Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission *shall* continue such license in effect...." (Emphasis supplied.)

Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(c)), provides in pertinent part:

> "When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely

> affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. . . . When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." [1]

STATEMENT

Petitioner (hereinafter "Lamar") operated television station WLBT, Jackson, Mississippi, pursuant to a validly granted license, regularly renewed, from 1952 until 1964, when a petition to deny Lamar's renewal application was filed, alleging that Lamar had failed to serve the needs of the black community. The Federal Communications Commission, however, granted Lamar a one year renewal of license (*Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965)). The lower court reversed and ordered a full evidentiary hearing,[2] after which the Hearing Examiner ren-

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[1] In addition, the Federal Communications Commission's Rules, Section 1.62(a)(1), 47 C.F.R. § 1.62(a)(1), implementing the statutes, contain the same express provision:

> "§1.62 Operation pending action on renewal application.
>
> (a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing nature, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application. . . ."

[2] Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

dered an Initial Decision granting Lamar's renewal.[3] The Commission affirmed.[4] The lower court again reversed the Commission.[5]

Although the power to deny a renewal application is clearly reserved to the Commission, the court's decision appeared to direct a denial of Lamar's renewal application rather than to vacate the Commission's grant and to restore the application to pending status for further agency action. The allegations against Lamar had been resolved by both the Examiner and the Commission in Lamar's favor, but the court held that the agency had reached its conclusions on the basis of an improper allocation of the burden of proof. Instead of remanding the matter for correction by the agency, however, the court seemingly concluded that no further agency action on Lamar's renewal was required.

Petitions for rehearing were filed by both Lamar and the Commission on the ground that it is the Commission and not the court which has the power and the duty to dispose of renewal applications. Both also contended that Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), provide that a pending applicant for renewal of license *shall* remain as licensee, even after the expiration of his license term, until the pending application receives final disposition.[6]

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[3] Lamar Life Broadcasting Co., 14 F.C.C.2d 495 (1967).

[4] Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968).

[5] Office of Communication of United Church of Christ v. FCC, 138 U.S. App. D.C. 112, 425 F.2d 543 (1969), rehearing denied *en banc*, 138 U.S. App. D.C. 120, 425 F.2d 550 (1969).

[6] The Commission's own rules, Section 1.62(a)(1), 47 C.F.R. § 1.62(a)(1), contain the same explicit provision.

By order of the court below, dated September 5, 1969, the petitions for rehearing were denied.[7] In an accompanying "Statement," Judges McGowan and Tamm sought to clarify the intent of the Court's decision of June 20, 1969, to conform it to the statutory directives.[8] The "Statement" expressly confirmed that the court did not direct a denial of Lamar's license, thus recognizing Lamar's pending renewal applicant status.[9] The court also noted the early expiration date of the then current license term, *i.e.*, June 1, 1970, and urged that a hearing to choose a licensee get underway promptly before that date among new competing applicants, including Lamar.[10] For the convenience of the Court, the June 20, 1969, and September 5, 1969 opinions of the Court of Appeals are reproduced in the appendix to this petition. (A.25 and A.39, respectively.)

On December 5, 1969, the Commission released an Order inviting new applicants for the facility. *Lamar Life Broadcasting Co.*, 20 F.C.C.2d 635 (1969). The Order vacated the grant of Lamar's renewal application and permitted Lamar

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[7] Office of Communication of United Church of Christ v. FCC, *supra*, 138 U.S. App. D.C. 112, 120, 425 F.2d 543 at 550.

[8] Judges McGowan and Tamm were the remaining two members of the panel which rendered the June 20, 1969, decision, the third member, Judge Burger, having meanwhile, on June 23, 1969, been sworn in as Chief Justice of the United States.

[9] The court, by way of dictum, expressed doubt that Congress intended that a hold-over licensee should continue in operation indefinitely merely because the Commission was unable or unwilling to conduct proceedings which will survive judicial scrutiny.

[10] Lamar did not seek appellate review of the lower court's action at that time because it concluded that the court had recognized its right to continue operating as a hold-over licensee until an expedited hearing could be held by the agency to determine whether its license would be renewed for the new term commencing June 1, 1970, or whether a license would be granted to one of the new applicants who, by statute, may compete with an existing renewal applicant.

to file a new Form 301 application rather than "amend the pending renewal application, form 302." 20 F.C.C.2d at 636. The Commission emphasized that "there had [*sic*] been no '* * * denial of the license renewal application' . . . ." 20 F.C.C.2d at 635. Despite this protestation, the clear-cut effect was to deny Lamar its rights as a renewal applicant.[11]

On April 27, 1970, three applications for interim authority to operate WLBT pending the resolution of the comparative hearing on the several applications which had been submitted were filed. These were: (1) Channel 3 of Jackson, a Joint Venture (composed of three of the permanent applicants); (2) Communications Improvement, Inc. (CII), a non-permanent, non-profit applicant; and (3) Lamar, which again asserted its statutory right to continue to operate as a hold-over licensee, but which also tendered an interim proposal for consideration with the others.

By Order of March 12, 1970, the Commission expressly stated that no hearing or oral argument would be permitted on the interim applications. *Lamar Life Broadcasting Co.*, 22 F.C.C.2d 47, 48 (1970).[12] In filing its interim proposal, Lamar reserved the right to challenge this peremptory procedure and asserted that challenge in its appeal to the court below.

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[11] On February 3, 1970, Lamar filed a new application under protest and tendered a major amendment to its pending renewal application.

[12] This summary procedure was contrary to the procedure followed by the Commission in two other cases involving AM radio stations in which it had authorized interim proposals. Oak Knoll Broadcasting Corp., 2 Pike & Fischer Radio Regulation 2d 1011 (1964); Pike-Mo Broadcasting Co., 2 F.C.C.2d 207 (1965), *aff'd*, Beloit Broadcasters, Inc. v. FCC, 125 U.S. App. D.C. 29, 365 F.2d 962 (1966). In both cases the Commission afforded oral hearings or oral argument—in one, before the full Commission; in the other, before the Commission's Review Board.

On September 8, 1970, the Commission released its decision—without hearing or oral argument—rejecting Lamar's contention that it had the statutory right to continue to operate WLBT under Section 307(d) of the Communications Act and granting the application of CII. (A.1)

Lamar appealed the September 8, 1970, Order and, on September 23, 1970, filed a motion for stay coupled with a request for immediate decision on the merits and for other relief. Because of the request for immediate decision on the merits, Lamar specifically requested oral argument of the duration allocated for arguments on the merits.

On March 17, 1971, the court below, acting through a two-judge panel, filed a *per curiam* Order, without having heard oral argument, in which Lamar's appeal *on the merits* was given summary disposition in one sentence, to wit:

> "ORDERED by the Court that applicant's motion for immediate decision on the merits is granted and the order of the Federal Communications Commission, appealed from herein, is hereby affirmed . . ." (A.24)[13]

The effect of the lower court's summary action is to deprive Lamar of its statutory and property rights, without having had an opportunity for oral hearing or argument at either the agency or judicial level. Indeed, the court's action deprives Lamar of such rights even though the only factual determinations which have been made were resolved in Lamar's favor. Moreover, the court's holding is at odds with two mandates of the Congress and a prior decision by the same court.

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[13] Lamar filed a timely petition for rehearing and suggestion for rehearing *en banc* which was denied on April 30, 1971. (A.43, 44) A motion to stay the mandate of the lower court pending a petition to this Court for a writ of certiorari was granted on May 14, 1971. (A.45)

REASONS FOR GRANTING THE WRIT

The Commission's Decision, as Affirmed by the Court Below, Is in Conflict With the Mandates of the Congress Expressed in Both the Communications Act and the Administrative Procedure Act.

Section 307(d) of the Communications Act of 1934, as amended, and Section 9(b) of the Administrative Procedure Act, guarantee to the licensees of broadcast stations that their licenses shall remain in effect until the Commission shall have made final disposition of their timely and properly filed applications for renewal of license. The essence of the broadcast license is the right to operate. Without such right, the license is meaningless. Further, the right to operate carries with it the right of the licensee to enjoy the fruits or suffer the losses from such operation.

Acting pursuant to these statutory provisions and its own Rule 1.62(a)(1), which implements them, the Commission, until the decision in this case, has regularly and routinely permitted broadcast licensees to operate beyond the expiration date of their licenses pending Commission action on their renewal applications. Without such statutory safeguards, the Commission would be free to permit licenses to expire by sheer delay or inaction if it determined that an incumbent licensee did not suit its fancy. Indeed, the legislative history of Section 9(b) of the Administrative Procedure Act indicates that it was the desire of Congress to circumvent such dangers that prompted the language of that section:

> "These special provisions are necessary because of the very serious consequences of the conferring of licensing authority upon administrative agencies. If agencies are dilatory . . . parties are subjected to ir-

reparable injuries unless safeguards are provided." Legislative History of Administrative Procedure Act, 79th Cong., 2d Sess., Senate Doc. No. 248, p. 368.

In the instant case, there is no question that Lamar filed a timely and proper application for license renewal, thus bringing it within the statutory safeguards of Sections 307(d) of the Communications Act and 9(b) of the Administrative Procedure Act until final agency disposition of its application. After full evidentiary hearing, in which the agency resolved all material adverse factual allegations in Lamar's favor and granted renewal, the court below reversed on the ground that the case had been conducted under an improper allocation of the burden of proof and because the Commission's decision, in the court's view, was not supported by the substantial evidence of record. The court remanded, ordering the grant of the renewal application vacated.

At this point it was the limit of the court's power to remand to the agency for further hearing on the factual allegations or for a reconsideration by the agency of its decision. *FRC* v. *Nelson Bros. Co.*, 289 U.S. 266, 274-78 (1933); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App. D.C. 264, 270, 345 F.2d 954, 960 (1965), *cert. denied*, 383 U.S. 906 (1966).

The court, however, exceeded its power by directing that no new hearing on or further consideration of the pending renewal application was required. Instead, the court ordered that new applications for the license be invited, with Lamar being accorded the "privilege" of filing a new application. Whatever may have been its other errors, at least the court recognized that Lamar was not disqualified

to be a licensee. Acting pursuant to the remand, the Commission invited new applications, directed Lamar to file a new application and, in designating that application for hearing with those of competing applicants, expressly recognized that Lamar's renewal application was still pending. Action on that application was deferred until after the Commission could determine whether Lamar's new application or that of one of the competing applicants should be granted. *Lamar Life Broadcasting Co.*, 25 F.C.C. 2d 101 (1970).

Thereafter, the Commission invited applications for interim authority to operate WLBT while the comparative hearing to determine a permanent licensee was conducted. The Commission then granted interim operating authority to Communications Improvement, Inc., and denied Lamar's request that its statutory right to operate as a "hold-over" *licensee under Section 307(d) of the Communications Act* be recognized. The court below affirmed.

Thus, the Commission and the court, while recognizing the pendency of Lamar's renewal application without final action, have directed Lamar to be treated as a new applicant and have stripped it of its statutory right to operate as a pending renewal applicant. This both the Commission and the court did, without hearing and without oral argument, even though the only factual determinations with respect to Lamar's qualifications had been resolved by the agency in Lamar's favor.

The result is to read out of the law the statutory safeguards provided to broadcast licensees in not one, but two statutes, the protective language of which is clear, unambiguous and mandatory.[14]

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[14] The holding of the court below is also squarely in conflict with the thrust of the language of that court in a prior decision involv-

The practical effect of the decision is to deny to Lamar the intended use of its facilities and to deprive Lamar of the profits from such use. If the right to operate is taken from the owner, the value of the physical broadcast plant is immediately and substantially reduced. According to a recent appraisal, Lamar's television property alone—licensed, in place and operating—has a fair market value approximating at least $7,000,000. The transmission equipment has a unique value that exists only by virtue of the license to operate. If that license is taken, the physical plant must be sold either for salvage value, as used equipment for use elsewhere, or to a single potential purchaser, chosen by the Federal Communications Commission, under distress conditions. Of even greater consequence, the profits from the operation of the station, which approximated $500,000 annually before taxes in 1968 and 1969, will be *lost to Lamar.*[15]

The legal effect of the grant of interim operating authority to CII is to deny Lamar's renewal application without hearing and without oral argument, before either the

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ing an interim operating grant. Consolidated Nine, Inc. v. FCC, 131 U.S. App. D.C. 179, 403 F.2d 585 (1968). There the existing operator, unlike Lamar, had never held a valid license, had not filed a renewal application and did not claim "hold-over" renewal applicant status. In distinguishing that situation from other cases, the court expressly recognized that " . . . under Section 307(d) . . . a timely application for *renewal* of a valid license keeps the original license in effect until the renewal application has been acted upon." (Emphasis in original; 131 U.S. App. D.C. 179 at 188, 403 F.2d 585 at 594.)

[15] The profits in 1970 were considerably lower, reflecting the down-turn in the economy. However, even if Lamar leases its physical facilities to an interim operator, the return will be far less than that received as a licensee. In current negotiations with CII, the highest temporary rental figure, subject to arbitration up or down, suggested by CII is less than one-half the cash flow from the operation of WLBT in 1968 and 1969.

agency or the court, thus depriving Lamar of its statutory rights in contravention of the safeguards accorded to Lamar by both the Communications Act and the Administrative Procedure Act.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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